84-864

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

MILLER BREWING COMPANY,

Petitioner,

v.

BREWERY WORKERS LOCAL UNION NO. 9, DIRECTLY AFFILIATED LOCAL UNION, AFL-CIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Does Article I, Section 5 of the Agreement, which provides laid off regular employees of a former signatory employer with a preference in hiring over other union member temporary employees, constitute illegal discrimination in violation of §8(b)(2) of the National Labor Relations Act?

II. Can a federal court refuse to confirm an arbitration award, based upon the company's claim that the award unlawfully discriminates in favor of union members in violation of §8(b) of the NLRA, where the National Labor Relations Board has specifically found the clause legal and enforceable under the Act and not a violation of §8(b)?

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RESPONDENT'S BRIEF IN OPPOSITION

The Brewery Workers Local Union No. 9, Directly Affiliated Local Union, AFL-CIO, respectfully requests that this Court deny the Petition of the Miller Brewing Company for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Contrary to Petitioner's contentions before the Court of Appeals and here, the grievance, arbitration and this litigation does not involve Article I, Section 3 of the Agreement. The sole contractual provision involved in the underlying grievance and this litigation is Article I, Section 5.

In late 1981, the Schlitz Brewing Company closed its Milwaukee brewery and permanently laid off its regular employees. On January 4, 1982, Miller recalled 39 of its union member temporary employees who had been on lay off. It was this recall of the "union member temporary employees" which precipitated the grievance of the laid off regular employees of Schlitz. Thus, the only issue involved was the hiring preference provided in Article I, Section 5.

At the time, Article I, Section 5 provided:

> ". . . regular employees laid off from the signatory employers and those employers signatory to the 1979-81 agreement shall have preference in hiring before any such temporary employee is recalled."

Contrary to Petitioner's assertions, Article I, Section 3 was and is not involved in the grievance, arbitration or this litigation. The issue involved the preference accorded to laid off regular employees of Schlitz as against other union member temporary employees then on lay off. Neither grievance nor this litigation involved outside applicants for employment. The only issue concerned the competing rights of laid off regular employees as against temporary employees --- who, by definition and union security clauses, were members of the Respondent union.

On January 19, 1983, Miller filed an unfair labor practice charge with the NLRB, alleging that the hiring preference and award violated §8(b)(2) of the Act by unlawfully discriminating in favor of union members. The Regional Director, after consideration of the parties' positions as well as the unique multi-employer bargaining history, dismissed the charge, concluding that: "the contractual language does not favor union membership . . . but [is] designed to preserve jobs for bargaining unit employees."(Res. App. D, p.3).

Miller appealed the dismissal to the General Counsel of the NLRB. The General Counsel determined that the unique and peculiar factual circumstances involved in the employer's withdrawal from the association, the strike and permanent shutdown of the plant:

> ". . . gave rise to lingering bargaining unit interests on the part of laid off Schlitz employees which the union could legitimately seek to protect." (Res. App. E, p.2).

In fulfillment of its obligation to enforce the Act and effectuate its purposes, the NLRB twice determined that the clause and award did not violate §8(b)(2) of the Act.

The Court below, as had the NLRB, determined that the unusual and peculiar facts involved in the longstanding multi-employer bargaining history, the clauses and the unique, unexpected and rapidly changing circumstances faced by the union in the 1981 negotiations rendered the clause a "lawful form of job insurance for brewery workers." (Pet. App. A, p.12).

In addition, the Court below, as had the NLRB, recognized that an accurate

analysis reveals that there was, in fact, no discrimination in favor of union members. The Seventh Circuit stated:

> ". . . the benefit was incidental and may be non-existent: the temporary employees who Miller rehired in lieu of hiring former Schlitz workers were also members of Local 9. There was no showing of discrimination against non-union workers in the actual operation of the hiring-preference clause." (Pet. App. A, p.12).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW, AS WELL AS THE DECISIONS OF THE NLRB, TURN UPON THE PECULIAR FACTS, THE UNIQUE LONGSTANDING MULTI-EMPLOYER BARGAINING HISTORY AND THE PARTICULAR UNUSUAL CONTRACTUAL PROVISION INVOLVED.

As the Court below noted, the legality of Article I, Section 5 is intimately involved with the longstanding multi-employer collective bargaining history and successive agreements which existed in the brewing industry of Milwaukee, Wisconsin for many years. Against this background, the Schlitz Brewing Company, announced its decision to withdraw from the multi-employer

association and demanded the right to negotiate separately with Local 9.

For the first time, the union was forced to negotiate separately with the Brewery Proprietors and the Schlitz Brewing Company. The union negotiated a modification of the main agreement to continue the hiring preference that had existed in all prior agreements since at least 1945. The union negotiated this change in the reasonable, although as it turned out, erroneous belief that it would reach an agreement with Schlitz. The union's intent was simply to continue the arrangement that the Milwaukee breweries had with the union for many years and to minimize the effect of the withdrawal of Schlitz upon the regular employees of that company.

The Court below, based upon the unique and peculiar circumstances and facts occurring in 1981 with the withdrawal of Schlitz from the association, the strike and subsequent permanent closing of the brewery, concluded that:

> "The clause had provided a lawful form of job insurance for brewery workers in all the

> years that Schlitz had been a member of the multi-employer bargaining unit; and it was natural for all concerned to want to continue this insurance after Schlitz left the unit." (Pet. App. A, p. 12).

The decision of the Court below was based upon the unusual and unique factual circumstances and peculiar contractual provisions that had their very genesis in the exceptional, unique and unexpected occurrences arising during the negotiations of 1981.

The Regional Director, in considering the same asserted violation of §8(b)(2), reviewed the unique language and facts surrounding the multi-employer association, the withdrawal of Schlitz, the separate negotiations of the strike of 1981. The Regional Director likewise determined:

> ". . . that the contractual language does not favor union membership. . . . that the clauses are not illegal per se, have not been applied or enforced by the union in an illegal manner and <u>are not contrary to public policy, but are designed to preserve jobs for bargaining unit employees.</u>" (Res. App. D, p.3).

The General Counsel affirmed the dismissal and issued his decision concluding:

> ". . . in light of the long-standing multi-employer single unit bargaining relationship of the employers involved herein, and the fact that Schlitz completely ceased operation shortly after its withdrawal from the multi-employer bargaining association, thereby permanently laying off employees who had until very recently been part of the multi-employer unit, it was determined that these circumstances gave rise to lingering bargaining unit interests on the part of Schlitz laid off employees which the union could legitimately seek to protect by demanding that Miller hire the laid off Schlitz employees." (Res. App. E, p.2).

As established by the decision below, as well as the two decisions of the NLRB, the legality of the clause and this litigation turn upon its own particular facts, the unique multi-employer bargaining history and the unusual contractual provision involved. Certiorari should not be granted where review is sought from a lower court

decision which turns solely upon the Court's analysis of the peculiar facts involved or upon the construction of particular contracts. United States v. Johnston, 268 U.S. 220, 227 (1925).

The unique factual circumstances involved with the longstanding multi-employer bargaining history, the withdrawal of one of the members, the separate bargaining, the strike and consequent closing of the plant gave rise to such unusual factual circumstances that no purpose can be served by further appellate review.

The clause itself no longer exists and has no application beyond the life of the now expired agreement. Precisely because of the unique bargaining history, and the peculiar facts surrounding the negotiation of the clause and the temporal relationship of the strike and closing of the plant, the decision below will affect no one other than the actual litigants to this case and has no importance beyond the present parties. The Court below, as well as the NLRB,

determined the clause to be legal based upon the peculiar facts and history involved. No exception has been created to any provision of §8(b)(2) of the NLRA by the Seventh Circuit's decision.

II. THE DECISION BELOW IS NOT BASED UPON A "GOOD FAITH" EXCEPTION, BUT RATHER, UPON THE SEVENTH CIRCUIT'S RECOGNITION THAT THE CLAUSE DOES NOT DISCRIMINATE OR GRANT BENEFIT ON THE BASIS OF UNION MEMBERSHIP.

Neither Article I, Section 3 nor outside applicants for employment are involved in the grievance, the arbitration or this litigation. The sole provision under consideration is Article I, Section 5. That Article provides:

> ". . . regular employees laid off from other signatory employers or those employers signatory to the 1979-81 agreement shall have preference in hiring before any such temporary employee is recalled."

This entire litigation arose when Miller recalled its union member temporary employees from lay off without according laid off regular employees of Schlitz any preference whatsoever. It was that act which precipitated the grievance. The issue

does not involve unrelated applicants for employment.

As recognized by the Court below, discrimination on the basis of union membership is non-existent:

> ". . . the temporary employees who Miller rehired in lieu of hiring former Schlitz workers were also members of Local 9. There has been no showing of discrimination against non-union workers in the actual operation of the hiring-preference clause." (Pet. App. A, p. 12)

There can be no violation of §8(b) when the individuals whom Petitioner claims to have been discriminated against were also members of the union.

Each of the temporary employees recalled by Miller, by definition and operation of union security clauses, were members of Local 9. Consequently, there could be no discrimination against those individuals based upon membership or non-membership in the Respondent union. Quite simply, the temporary employees who Miller did recall were members of the union.

The Regional Director likewise recognized the absence of discrimination:

> "The evidence establishes that all of the temporary employees recalled by the employer on January 4, 1982 were either active members of the union or on withdrawal card status. . . . based upon the foregoing, I find that the contractual language does not favor union membership." (Res. App. D, p.3).

As the operation of the clause only impacts upon members of the union, as opposed to non-union individuals, no possible discrimination could occur on the basis of non-membership in the union.

III. THE RESPONDENT'S OTHER MERITORIOUS ARGUMENTS DEMONSTRATE THAT THE DECISION BELOW IS CORRECT REGARDLESS OF THE QUESTIONS SOUGHT TO BE RAISED BY THE PETITION.

Article I, Section 5 does not, on its face or in practice, give any preference on the basis of union membership. Rather, a preference is created only on behalf of "laid off regular employees." To qualify for the preference, employees need not be members of the union. The preference is not based upon union membership, but rather,

upon status as a "laid off regular employee."

While some individuals may have been members of the union by virtue of the prior union security clauses, their status as union members bears absolutely no relationship to whether or not they were entitled to the preference accorded by the agreement.

Under the Constitution and By Laws of the local union, members who have been laid off from their employment for a period of two months must apply for a withdrawal card. Thus, when an employee is laid off in excess of two months he no longer holds membership status.

Despite the fact that a laid off regular employee may lose his membership status, he has the right to the contractual preference accorded by Article I. He is and remains a "regular employee laid off" from another designated signatory employer. Union membership is not a prerequisite or condition precedent to the obtaining of the preference or employment.

In Courier Citizen Co. v. Local 11, 712 F.2d 273 (1st Cir., 1983) the First Circuit, in considering a similar preferential clause, stated:

> "The contractual preference in issue does not discriminate on the basis of union affiliation as such. Every member of the . . . bargaining unit is entitled to the preference without regard to union status. The collective bargaining agreement distinguishes among these employees not on the basis of their union status but rather on the basis of their seniority." 112 LRRM at 3126.

In NLRB v. New York Typographical Union No. 6, 632 F.2d 173 (2nd Cir., 1980) the Court held that a similar preferential hiring clause did not violate §8(b)(2) of the Act. The Second Circuit determined that:

> "Even if category A were, on its face or as a practical matter, limited to union members, there is no rational basis for inferring that the preference given to 'A employees' has the effect of encouraging union membership, because priority is accorded only to those who were working . . . as of October 4, 1975. Thus, the class benefited here is closed to new

> members. . . . One cannot gain this benefit by joining the union."

Here, as in NLRB v. New York Typographical Union No. 6, supra, no one can obtain the status required for preferential hiring by joining the union. One is entitled to the hiring preference only by being "a regular employee laid off" from a designated signatory employer. One cannot obtain that status by joining the union. The class of employees entitled to that status is closed.

Not only is there no discrimination as between union members in the operation of the clause, there is no encouragement of union membership by virtue of the existence of the clause. The class to be benefited by the clause is closed to new members.

The result in the decision below is correct without regard to the questions sought to be raised by the Petitioner. It is unlikely that this Court would be required to reach any issue or point of alleged importance or conflict in the

interpretation of the National Labor Relations Act.

IV. THE COURT BELOW ERRED IN FAILING TO DEFER TO THE DECISIONS OF THE NLRB.

The NLRB determined the clause to be legal and enforceable under all of the peculiar facts and circumstances involved in this litigation.

For a Federal Court to determine that the same clause is unenforceable, solely because the clause violates §8(b) of the Act, would produce a direct and irreconcilable conflict between the Courts and the NLRB. The Court would, of necessity, be required to usurp the role of the NLRB and interpret the Act in a manner precisely contrary to the Board's own interpretation as reflected in its decisions.

The decisions of the Board's Regional Director and General Counsel do not represent a mere exercise of prosecutorial discretion as asserted by the Court below. Rather, the NLRB reviewed all the evidence and made its determination that the clause did not violate the Act given the policies and purposes of the NLRA.

The question is not merely whether or not the Court should act as the initial arbiter of an unfair labor practice in order to avoid enforcing an illegal clause as in Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982). Rather, the question is one of primary jurisdiction and the authority of the Court to overrule the NLRB on a matter entrusted exclusively to its expertise. Burke v. French Equipment Rental Co., 687 F2d 307 (9th Cir., 1982).

For a Court to now determine that the clause under the unique factual circumstances constitutes a violation of §8(b)(2) of the Act would result in a direct and irreconcileable conflict with the NLRB's own interpretation of the Act. The Board has determined that, under the circumstances, the clause is legal and enforceable based upon its interpretation of the NLRA.

These decisions of the Board do not represent a simple exercise of prosecutorial discretion. Rather, the decision of the Board is based upon the Board's own interpretation of the clause and §8(b) of the Act. The Board, based upon the identical

evidence presented to the Court below, determined that there was no violation of the National Labor Relations Act. Thus, the Court below should have deferred to the Board's own interpretation of the clause and the Act. Consequently, there is no need for further review in this Court.

CONCLUSION

For all of the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 6th day of December, 1984.

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/s/
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APPENDIX D

NATIONAL LABOR RELATIONS BOARD
REGION 30
Suite 230, Commerce Building,
744 North Fourth Street
Milwaukee, Wisconsin 53203

March 1, 1983

Quarles & Brady
Attn: George K. Whyte, Jr., Esq.
780 North Water Street
Milwaukee, WI 53202

Re: Brewery Workers Local Union No. 9 Directed Affiliated Union, AFL-CIO (Miller Brewing Company)
Case No. 30-CB-2034

Dear Mr. Whyte:

The above captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, the evidence fails to establish that the above-named labor organization engaged in conduct violative of Section 8(b)(1)(A) or (2) of the Act by maintaining, enforcing, and giving effect to contractual clauses relating to the recall or rehire of employees.

The evidence establishes that the Employer is a member of a multi-employer association which, until 1981, included Schlitz Brewing Company. Until 1981 the collective-bargaining agreements between the Association and Union provided, inter alia, that laid off regular (permanent) employees of another employer in the Association are to be recalled before an employer can recall its own temporary employees. In 1981, Schlitz timely withdrew from the Association.

On June 8, 1981, the Association and Union entered into the current contract. The relevant language regarding recall and rehire was modified to encompass "laid off regular employees of those Employers signatory to the 1979-81 agreement shall receive preference . . . ." This clause encompasses the Schlitz production employees. On or about September 30, 1981 Schlitz ceased operating and many unit employees applied to the Employer. The Employer, on January 4, 1982 recalled 39 of its own temporary employees, and a grievance was filed. The arbitrator ruled, on July 26, 1982, that the regular former Schlitz employees were

permanently laid off and had preference over the Employer's temporary employees. The enforcement of this award is pending before the United States District Court.

The evidence establishes that all of the temporary employees recalled by the Employer on January 4, 1982 were either active members of the Union or on withdrawal card status. The similar situation existed with respect to the Schlitz applicants. Based upon the foregoing, I find that the contractual language does not favor union membership. I further find that the clauses are not illegal per se, have not been applied or enforced by the Union in an i. egal manner, and are not contrary to public policy, but are designed to preserve jobs for bargaining unit employees. Accordingly, further proceedings are not warranted, and I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,
George Squillacote
Regional Director

APPENDIX E

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

July 20, 1983

Re: Brewery Workers Local Union #9 Directed Affiliated Union, AFL-CIO (Miller Brewing Company) Case No. 30-CB-2034

George K. Whyte, Jr., Esq.
Quarles & Brady
780 North Water Street
Milwaukee, Wisconsin 53202

Dear Mr. Whyte:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned matter has been fully considered.

The appeal is denied. Under the circumstances herein, it would not effectuate the purposes of the Act to issue complaint in the instant case. A union ordinarily would have no authority to compel an employer to hire laid off employees from another unit covered by a separate union contract before recalling its own temporary employees or

new employees who had not worked previously for a unionized employer. However, in light of the longstanding multi-employer single unit bargaining relationship of the employers involved herein, and the fact that Schlitz completely ceased operations shortly after its withdrawal from the multi-employer bargaining association, thereby permanently laying off employees who had until very recently been a part of the multi-employer unit, it was determined that these circumstances gave rise to lingering bargaining unit interests on the part of laid off Schlitz employees which the Union could legitimately seek to protect by demanding that Miller hire the laid off Schlitz employees.

Accordingly, further proceedings herein were deemed unwarranted.

Very truly yours,
William A. Lubbers
General Counsel
By: Mary M. Shanklin,
Director
Office of Appeals